

FILED

AUG 3 1990

JOSEPH F. SPANIOLO, JR.
CLERK

No. 89-1737

in the
Supreme Court
of the
United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE WARRANTLESS CUSTOMS SEARCH OF A PRIVATE AIRPLANE IN A COMPLETELY ENCLOSED PRIVATE HANGAR WITHIN THE CURTILAGE OF PETITIONER'S HOME, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, CAN BE JUSTIFIED BY THE SEARCH AT THE FUNCTIONAL EQUIVALENT OF THE BORDER EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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REPLY

The government contends that because the prerequisites of a search at the functional equivalent of a border have been met, it is therefore reasonable. The government fails to take into account this Court's language in *Payton v. New York*, 445 U.S. 573, 591 (1980):

In terms that apply equally to seizure of property and to seizure of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The government further fails to take into account the plain language of the statute which requires Customs to obtain a warrant when dealing with the home. Specifically, 19 U.S.C. 1595(a) reads in pertinent part as follows:

(1) If any officer . . . has probable cause to believe that—

(A) any merchandise which has been otherwise brought into the United States unlawfully;

is in any dwelling house, store, or other building or place, he may make application, under oath, to any . . . Federal judge, or to any Federal magistrate, and shall thereupon be entitled to a warrant to enter such dwelling house.

Finally, the Court of Appeals for the Second Circuit has recognized that “the border search exception does not justify searches of homes.” *United States v. Saint Prix*, 672 F.2d 1077, 1082-1083 n.10 (2d Cir. 1981).

The government says that petitioner does not dispute that there existed probable cause to arrest him. The government’s statement is erroneous. Petitioner has always contended that Customs did not have probable cause to arrest him. (See both initial and reply brief filed with Eleventh Circuit). However, it should be noted that this Court in *Payton* found that a warrant is required even if both statutory authority and probable cause are present.

[A]n invasion of the sanctity of the home . . . is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under

statutory authority and when probable cause is clearly present.

See *Payton*, 445 U.S. at 588, quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978).

The sole issue for this Court to decide, petitioner submits, is whether the Constitution's search warrant requirement takes precedence over the border search exception when it is the home that is being searched. Relying on this Court's prior decisions and the statutory guidance cited above, petitioner requests that this Court grant certiorari so the issue presented can be briefed, argued and decided by this Court.

CONCLUSION

For the foregoing reasons, Petitioner NELSON EMMENS, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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Dated this 3rd day of August, 1990.